Muslim Advocates v. City of Los Angeles, et al., BS 163755

Tentative decision on petition for writ of mandate: granted in part

Petitioner Muslim Advocates ("Advocates") seeks a writ of mandate to compel Respondent Los Angeles Police Department ("LAPD") and City of Los Angeles ("City")(collectively, "LAPD") to perform an additional search for records responsive to Advocates' request pursuant to the California Public Records Act ("CPRA").

The court has read and considered the moving papers,[1] opposition, and reply, and renders the following tentative decision.

A. Statement of the Case

1. Petition

Petitioner Muslim Advocates commenced this proceeding on July 25, 2016. The verified Petition alleges in pertinent part as follows.

Muslim Advocates is a national legal advocacy and educational organization that counters anti-Muslim bigotry, empowers Muslim communities through charity and education, and fights discrimination through litigation and policy engagement.

On October 30, 2007, Deputy Chief Michael P. Downing ("Downing"), then serving as the Commanding Officer of LAPD's Counter-Terrorism/Special Criminal Intelligence Bureau (now known as Counter-Terrorism and Special Operations Bureau ("CTSOB"), appeared before the U.S. Senate Committee on Homeland Security and Governmental Affairs. Downing discussed a recent initiative by LAPD and an academic institution to conduct an extensive community mapping project to lay out the geographic locations of the many different Muslim population groups in Los Angeles.

On November 8, 2007, Muslim Advocates joined the ACLU of Southern California, the Islamic Shura Council, and the Council on American Islamic Relations to send the LAPD an open letter expressing concern about the community mapping project. On November 14, 2007, following protests by Muslim groups and civil libertarians, LAPD announced it would drop the "Community Mapping" Program.

On December 12, 2013, Muslim Advocates' then-Legal Director Glenn Katon sent a Public Records Act request (the "request") to the LAPD's Discovery Section, directed to its custodian of records. Item No. 2 in the request sought "[a]ll records reflecting or relating to the 'community mapping' program, as described in the Senate Statement" of Deputy Chief Downing. The request made clear that it sought "records… for the period September 11, 2001, through the present [December 12, 2013]."

In response, LAPD asserted a 14-day extension to respond to Muslim Advocates' request. On January 17, 2014, LAPD responded to the request. In response to Item No. 2, LAPD stated that "[t]here are no documents responsive to your request."

On March 27, 2014, Muslim Advocates' counsel wrote to LAPD requesting "the basis

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[1] Petitioner's 17-page opening brief and LAPD's 16-page opposition violate the page limits of CRC 3.1113(d). The court has exercised its discretion to consider only the first 15 pages of each document.

for, or a correction of, the Department's… response to Item No. 2 of the Request… that '[t]here are no documents responsive to your request.'" In light of Deputy Chief Downing's statement to the United States Senate, it is simply implausible that no documents exist. The March 27 letter also made a supplemental request for records concerning LAPD's "effort to comply with the Request, including… [identification of] key custodians… that would be likely to maintain responsive files; Department communications regarding this request; any summaries prepared of the Request; and the name and title of the person in charge of responding to the Request".

LAPD replied to Muslim Advocates on July 2, 2014. The reply did not explain or correct LAPD's claim that no records exist relating to the Community Mapping program, nor did it provide records helpful in understanding the Department' search as sought by Muslim Advocates' supplemental request. Instead, LAPD merely repeated that "no responsive records were found."

Muslim Advocates sent another letter on August 1, 2014, seeking an explanation or correction of the LAPD's position. The letter asked LAPD to assist Muslim Advocates in identifying responsive records. Muslim Advocates made a second supplemental request, making clear that it sought records of the search terms used, electronic databases searched (as well as available databases not searched), and the paper files that were searched by LAPD in response to the initial Request. The letter also asked LAPD to "search [its] email system and other electronic databases for the term 'Community Mapping' and provide screen shots of the use of the term and databases searched." Muslim Advocates offered to "speak by phone with personnel in [the LAPD's] Information Technology Department to discuss the technical details of these searches and the Department's electronic storage systems for e-mails and records."

LAPD replied on August 19, 2014, invoked the "statutory fourteen days extension of time in which to respond," and promised a substantive response "as soon as possible." On March 16, 2015, Muslim Advocates' counsel followed up with LAPD to request a response to its letter. On March 26, 2015, the City Attorney's Office contacted Muslim Advocates' counsel and stated that it was assisting the Department in identifying responsive, non-exempt records.

On April 20, 2015, LAPD responded to the August 1, 2014 letter. LAPD did not produce any records, and agreed only to conduct a search term query of the email accounts for seven employees using the search terms "Muslim Mapping," "Community Mapping," and "Mapping Program." The search was to be limited to emails created after 2013.

Despite extensive communications between the parties, LAPD still refuses to search for the requested records from the relevant time period of 200l-2010, claiming it would be unduly burdensome to even attempt to find out which records exist. Respondents also have failed to fulfil their duty to assist Muslim Advocates in overcoming practical barriers to disclosing the records, in part by refusing to provide Muslim Advocates with indicia of the searches the LAPD has conducted in its email backups as to other time periods and subject matters.

Muslim Advocates alleges that Respondents' failure to locate records responsive to the request resulted from a search that was not a good-faith reasonable effort in violation of the CPRA. Respondents' serial delays in responding to Muslim Advocates' requests for records and follow-up correspondence also independently violate the CPRA, along with Respondents' failure to provide a reason for their determination to withhold approximately 4,495 post-2010 records stored on backed-up email, and their failure to produce attachments referred to in the five pages of post-2010 e-mail records that LAPD did disclose.

2. Course of Proceedings

On November 8, 2017, the court heard and denied Respondent City's motion to stay the proceedings pending the resolution of appellate litigation in City of Los Angeles v. Superior Court, Court of Appeal Case No. B269525.

B. Governing Law

The CPRA was enacted in 1968 to safeguard the accountability of government to the public. San Gabriel Tribune v. Superior Court, (1983) 143 Cal.App. 762, 771-72. Govt. Code[2] section 6250 declares that "access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state." The CPRA's purpose is to increase freedom of information by giving the public access to information in possession of public agencies. CBS. Inc. v. Block, (1986) 42 Cal. 3d 646, 651. The CPRA was intended to safeguard the accountability of government to the public, and it makes public access to governmental records a fundamental right of citizenship. Wilson v. Superior Court, (1996) 51 Cal.App.4th 1136, 1141. This requires maximum disclosure of the conduct of government operations. California State University Fresno Assn., Inc. v. Superior Court, (2001) 90 Cal.App.4th 810, 823. In 2004, the voters endorsed the CPRA by approving Prop 59, which amended the state Constitution to declare that "the writings of public agencies…shall be open to public scrutiny." Cal. Const. Art. I, §3(b).

The CPRA makes clear that "every person" has a right to inspect any public record. §6253(a). The term "public record" is broadly defined to include "any writing containing information relating to the conduct of the people's business prepared, owned, used or retained by any state or local agency regardless of physical form or characteristics. §6252(e). The inspection may be for any purpose; the requester's motivation is irrelevant. §6257.5.[3]

To determine if a search was adequate under the CPRA, California courts apply the standard used in Freedom of Information Act ("FOIA") cases, which provides that a search "need only be reasonably calculated to locate responsive documents" given the circumstances. ACLU v. Super. Ct., (2011) 202 Cal.App.4th 55, 85, citing Meerepol v. Meese ("Meerepol") (D.C. Cir. 1986) 790 F.2d 942, 951-56. "[T]he issue to be resolved is not whether there might exist any other documents possibly responsive to the request, but rather whether the search for those documents was adequate" in light of the relevant circumstances. Meerepol, *supra*, 790 F.2d at 951. An agency's search must be "reasonably calculated to locate responsive documents." Community Youth Athletic Center v. City of National City, ("CYAC"), (2013) 220 Cal.App.4th

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[2]All further statutory references are to the Government Code unless expressly stated otherwise.

[3] The right to inspect is subject to certain exemptions, which are narrowly construed. California State University, 90 Cal.App.4th at 831. The exemptions are found in sections 6254 and 6255. In pertinent part, public records exempt from disclosure include (1) personnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy [Section 6254(c)], and (2) records subject to a "catch-all" exemption where the facts of the particular case demonstrate that the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record. §6255. The burden of demonstrating that exemptions apply lies with the governmental entity. §6255.

1385, 1420 (citation omitted).

The scope of the search is dictated by the scope of the request. Id. "An agency is... obliged to search for records based on criteria set forth in the search request." California First Amendment Coalition v. Superior Court, ("CFAC"), (1998) 67 Cal.App.4th 159, 166. Based on the language of the request, an agency must "determine whether it has such writings under its control and the applicability of any exemption." Id. at 166. The agency's search "should be broad enough to account for the problem that the requester may not know what documents or information of interest an agency possesses." CYAC, *supra*, 220 Cal.App.4th at 1425 (citation omitted).

An agency also is required to provide assistance to a requester who solicits help locating responsive records. §6253.1 (a)(1). An agency must be "sufficiently proactive [and] diligent in making a reasonable effort to identify and locate" the requested records. Id. The California Attorney General counsels that, "[a]t a minimum, [reasonable] efforts should include: consulting record indexes [,] consulting knowledgeable people [, and] looking in logical places." Office of the California Attorney General, Public Records Act Training at 31 (available at http://ag.ca.gov/publications/pra.pdf).

An agency need only search files reasonably likely to contain responsive records. Jenkins v. United States, ("Jenkins") DOJ (D.D.C. July 12, 2017) 2017 U.S.Dist.LEXIS 107363, *7.) It "is not required to expend its limited resources on searches for which it is clear at the outset that no search will produce the records sought." Reyes v. EPA, ("Reyes") (D.D.C. 2014) 991 F.Supp.2d 20, 27; Earle v. United States, DOJ (D.D.C. 2016) 217 F.Supp.3d 117, 123. Moreover, if an agency shows it never had or no longer possesses the records requested, "the reasonable search required... may be no search at all." Reyes, *supra*, 991 F.Supp.2d at 27; Earle, *supra*, 217 F.Supp.3d at 124 (search would be futile where agency declaration showed records in question did not exist); Amnesty Int'l v. CIA, (S.D.N.Y. June 19, 2008) 2008 U.S.Dist.LEXIS 47822, at *34 (agency not required to search at all where it would be futile).

A clearly framed request which requires an agency to search an enormous volume of data for a 'needle in a haystack" or a request which compels the production of a large volume of material may be objectionable as unduly burdensome. CFAC, *supra*, 67 Cal.App.4th at 166. However, records requests impose some burden on agencies, and the agency is required to comply so long as the record can be recovered with reasonable effort. Id.

A petition for traditional mandamus is appropriate in actions "to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station...." CCP § 1085. This includes actions to compel compliance with CPRA. § 6258, 6259. No administrative record is required for traditional mandamus. The issue of ministerial duty is a question of law decided by the court *de novo*. *See* McGhan Medical Corp. v. Superior Court, (1992) 11 Cal.App.4th 804, 808. Where there are factual issues, the court must uphold the agency's action unless it is "arbitrary and capricious, lacking in evidentiary support, or made without due regard for the petitioner's rights." Sequoia Union High School District v. Aurora Charter High School, (2003) 112 Cal.App.4th 185, 195.

Ultimately, it is the agency's burden to prove the adequacy of its search by proffering evidence showing its search was reasonably calculated to locate all responsive records. Baltranena v. Clinton, 770 F.Supp.2d 175, 182 (D.D.C. 2011); CYAC, 220 Cal.App.4th at 1418 (quoting CFAC, *supra*, 67 Cal.App.4th at 167). An agency can show its search was adequate with affidavits showing where and how it searched for the records. Citizens Comm. on Human

Rights v. FDA, ((9th Cir. 1995) 45 F.3d 1325, 1328. In evaluating the agency's evidence on this issue, courts should consider "such relevant factors as the amount of time and staff devoted to the request and whether the agency attempted to limit its search to one or more places when other sources likely would have contained [the] information requested." Landmark Legal Foundation v. E.P.A., (D.D.C. 2003) 272 F.Supp.2d 59, 62.

C. Statement of Facts[4]

1. Community Mapping Program

"Community Mapping" was an idea conceived of by now retired CTSOB Deputy Chief Downing around September 2007. Downing Decl. ¶¶ 4, 6.

On October 30, 2007, Deputy Chief Downing testified before the U.S. Senate's Committee on Homeland Security and Governmental Affairs about LAPD's efforts to counter violent extremism. Charney Decl. Ex. KK ("Downing Depo."), pp. 19-20, 96-97; Ex. ZZ (Ex 2 to the Downing Deposition). At the time of his testimony, Community Mapping was conceptual only; nothing had been done. Downing Decl. ¶10.

In connection with his testimony, Downing prepared a written statement ("Senate Statement") which described Community Mapping as an initiative launched by LAPD to "lay out the geographic locations of the many different Muslim population groups around Los Angeles" and to "take a deeper look at their history, demographics, language, culture, ethnic breakdown, socio-economic status, and social interactions." Downing Depo., pp. 19-20, 96-98, 114-19. According to the Senate Statement, Community Mapping had at least four interrelated components: (1) LAPD's partnership with an academic institution to create a map identifying the physical location of members of various Muslim population groups; (2) LAPD's collection of the data sets needed to populate the map (i.e., the collection of information concerning the Muslim groups' respective demographics, language, culture, ethnic breakdown, socio-economic status, and social interactions); (3) LAPD's ongoing execution of its methodical engagement strategy to build trust with the Muslim communities; and (4) An "intelligence-led" strategy that the LAPD would employ once the Muslim group were mapped. Charney Decl. Ex. ZZ.

Apart from a brief description of the idea in his written Senate Statement, Downing did not create plans or documentation about Community Mapping, nor did he ask anyone under his command to do so. Downing Decl. ¶¶ 6, 15, 16. Before his testimony, Downing discussed his idea with a few CTSOB employees, a person in the Mayor's Office, and a USC professor and a person at the Muslim Public Affairs Council. Downing Decl. ¶¶ 7-9, 15-16. Other than those individuals, Downing did not discuss the idea outside CTOSB. He also did not enlist other

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[4] The court separately has ruled on Petitioner's written evidentiary objections, interlineating the original evidence where an objection was sustained. Petitioner asks the court to judicially notice (1) pertinent news articles (Exs. C, Z), (2) the organizational chart and Volume Two of the LAPD Manual (Exs. TTT, UUU), and reference material from a 1982 Congressional report (Ex. RRR) and a portion of the Adobe Acrobat user manual showing capability to search within a PDF (Ex. SSS). The requests are granted, Evid. Code §452 (c), (h).

Petitioner has used an unauthorized Separate Statement of Facts which appears designed in part to evade the page limits of CRC 3.1113(d). Moreover, a review of some of its statements of fact shows that many of its conclusions are not supported by the cited evidence. The Separate Statement of Facts has not been considered by the court.

LAPD units to perform work on it. Downing Decl. ¶¶ 6-10, 15-16.

A week after Downing's Senate testimony, members of the Muslim community, including Petitioner, voiced opposition to Community Mapping. Downing Decl. ¶11. In response, the Chief of Police held a meeting with Muslim leaders on November 15, 2007 and publicly confirmed that Community Mapping was "dead on arrival" and would not go forward. Downing Decl. ¶¶ 11-14. There was very little documentation of Community Mapping during its short life; all of the discussions were informal in nature. Downing Decl. ¶15. With the exception of responding to a 2015 e-mail from Professor Samuel Freedman, Downing did not engage in written correspondence about Community Mapping with anyone before or after its termination. Downing Decl. ¶¶ 7-9, 15-16; Downing Depo, pp. 190-02).

2. The CPRA Request

On December 12, 2013, Muslim Advocates sent a CPRA request to LAPD seeking, among other things, copies of "all records reflecting or relating to" Community Mapping. Toyama Decl. ¶11, Ex. A. CPRA requests typically go to LAPD's Discovery Division. Toyama Decl. ¶4. The request was processed by Discovery Section analyst Caydene Monk ("Monk"), with oversight from her supervisor, Greg Toyama. Toyama Decl. ¶13. Monk's initial job was to determine, based on the nature of the request, what divisions, bureaus, units, or other LAPD departments should receive the CPRA request. Toyama Decl. ¶5. On December 20, 2013, Monk sent correspondence (referred to as a "15.2") to three LAPD divisions forwarding the CPRA request: CTSOB; Policies and Procedures Division, formerly known as Planning and Research Division ("PRD"); and Training Division. Toyama Decl. ¶¶ 15, Exs. C-E.

LAPD responded to Muslim Advocates on January 17, 2014, stating that there were no documents responsive to the Community Mapping request and identifying 364 pages of records responsive to other items. Toyama Decl. ¶23, Ex. G.

Over the next two years, Petitioner submitted increasingly demanding requests and LAPD provided records. Pet. Exs. F, H-Y. LAPD also voluntarily searched for responsive emails for the period January 2010 to April 2015, reviewed over 4,000 pages of possibly responsive records, disclosed 17 pages of emails to Petitioner, and did research to find and provide what it believed to be attachments to those emails. Pet. Exs. U, X; Nguyen Decl. ¶¶2, 5, Exs. A, D.

By correspondence dated March 27, 2014, Muslim Advocates identified specific portions of the Senate Statement that led it to believe that the LAPD has records in its possession related to Community Mapping. Pet. Ex. H. In that letter, Muslim Advocates also asked the LAPD to specify if responsive records had been destroyed, and sought records relating to the agency's efforts to comply with the request. Id.

LAPD did supplemental searches and gathered information in response to Muslim Advocates' further requests for information and records. Toyama Decl. ¶¶ 25-27. LAPD provided 41 pages of records in response to Muslim Advocates' questions regarding the scope of the search. Toyama Decl. ¶26. LAPD also searched the emails of seven people identified by Muslim Advocates, including Downing and the three LAPD employees with whom he discussed Community Mapping, and reviewed the 4,000 pages generated by that search. Toyama Decl. ¶27, Ex. I. LAPD eventually disclosed 17 pages of emails to Petitioner, and did research to find and provide what it believed to be attachments to those emails. Pet. Exs. U, X; Nguyn Decl. ¶¶ 2, 5, Ex. A, D.

3. LAPD's Search

a. General Practice

When LAPD receives a CPRA request, an analyst in the Discovery Section is assigned to determine which of the 18 bureaus and offices, 81 divisions, or dozens of other sections or units are likely to have responsive records. Charney Decl. Ex. EE ("Toyama Depo."), pp. 81-82, 89-95, 97-98; Ex. TTT (LAPD Organizational Chart); Toyama Decl. ¶5. Once that determination is made, the analyst prepares and sends to the relevant bureaus/divisions/sections Intradepartmental Correspondence ("15.2"), informing the recipient that a request has been made, describing the records requested, and instructing the recipient to search for and produce any responsive material, or to provide a justification for withholding responsive records. Toyama Decl. ¶7. Staff within each division is then responsible for conducting the actual searches. Toyama Decl. ¶¶8-10.

There are no written policies or protocols to help analysts determine to which bureaus/divisions/sections to send 15.2s, and divisional staff are not given standards to guide their search. Toyama Depo, pp. 89-90, 92. Although LAPD trains staff on CPRA exemptions, it does not offer training on how to search for and identify disclosable records. Id., pp. 30-32. LAPD does not verify that people with knowledge were contacted, that all the places likely to hold records were searched, or that all responsive records have been produced. Toyama Depo, pp. 91.

LAPD policy requires that each division maintain inventories of its records. Personnel who search for records are supposed to fill out a hard-copy or electronic "chrono" report of their activity. Toyama Depo, pp. 313. The purpose of the chronological is to track what divisional personnel did to search, and if the places searched were reasonable. Toyama Depo, p. 322.[5]

b. The 15.2

The 15.2 prepared by Monk described the request as "asking for records pertaining to the policies or practices based upon individuals or communities that are Muslim, or of Arab, South Asian or Middle Eastern descent." The searches conducted by the custodians receiving the 15.2 were calculated to find records containing the term "Community Mapping", but did not search for records related to Community Mapping.

Monk was responsible for sending the 15.2 to the bureaus, divisions, and sections reasonably likely to possess responsive records. Toyama Decl. ¶¶13, 15. Monk requested an email search by the Information Technology division, and also sent the 15.2 to CTSOB, the Planning and Research Division ("PRD"), and the Police Training and Education ("PTE") Division. Toyama Decl. ¶15. PRD advised Monk that responsive records were likely to be found in the Community Relations Section and the Office of the Chief of Police. Toyama Depo, pp. 267-70; Moussa Depo., pp. 168-70. Monk never directed any additional 15.2s to those recommended divisions. Toyama Depo, p. 273.

c. CTSOB

Sergeant Michael Seguin ("Seguin") conducted the search of CTSOB's records. Seguin

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[5] LAPD produced only one such chronological log in this case, from the Planning and Research Division. Charney Decl. Ex. III.

Decl. ¶¶ 3-4. Because the CPRA request twice referenced Downing's Senate Statement, Seguin identified Downing as the person most likely to know of any records and consulted with him. Seguin Decl. ¶¶ 5-6. Downing explained that Community Mapping was a fledgling idea that was not fully developed and swiftly terminated, and had been discussed with only a few people. Id. Downing did not assign anyone to work on it, and had no records on it other than the Senate Statement. Id.

Despite Downing's statement that no records existed, Seguin conducted a search. Seguin Decl. ¶7. Seguin performed a limited search because Downing represented that no records existed. *See* Seguin Depo, pp. 35-38. Downing believed that documents were limited to operational documents with structure and organization, as distinct from written communications. Downing Depo, pp. 193-95. Downing did not consider emails, written correspondence, or other forms of records when he told Seguin that no responsive records existed. Downing Depo, pp. 127-28, 154-55, 189, 191-92, 193-209, 217-26.

Seguin searched CTSOB's shared divisional computer files, the "P Drive", using the terms "Community Mapping", "Senate Statement", and "Muslim Mapping". Seguin Decl. ¶¶ 7-8. The search yielded no results, confirming the accuracy of Downing's recollection that no records existed. Seguin Decl. ¶9. Seguin also reviewed backup emails provided to him by the Information Technology ("IT") Division looking for the words "Muslim" or "mapping. Seguin Depo, pp. 32-35. Seguin also searched for records responsive to Petitioner's other requests, and identified over 300 pages of documents. Seguin Decl. ¶10, Ex. A.

Seguin did not look in any of CTSOB's hard copy files, electronic devices, indices, or inventories. Seguin Depo, pp. 35-36, 47-54. Seguin did not ask any other LAPD personnel who might have had knowledge or records about the Community Mapping program, research the kind of records normally created for similar programs, or search for correspondence regarding the Community Mapping program. Seguin Depo, pp. 38-45, 56-59, 70. He also did not look at pertinent subject-matter folders on the file server, and did not know whether his search of the server looked at the contents of the documents. Id., pp. 70-73, 98-101.

d. PRD

PRD's records search was conducted by Tabitha Coronado ("Coronado") and her supervisor, Raymona Moussa ("Moussa"). Moussa Decl. ¶¶ 8, 10. Coronado searched PRD's electronic database ("ADTS") containing published policies, procedures, orders, and notices, as well as its reference library, which has hard copies of records not scanned into ADTS. Id. ¶¶ 3, 5, 8. Coronado identified three records: two notices from the Chief of Police and a LAPD Infoweb page listing a March 14, 2013 Muslim Community Forum. Id. ¶9.

Moussa did an independent search, which included searching: (i) ADTS using key words "community," "mapping," and "Muslim"; (ii) a database containing LAPD contracts with other organizations, using similar key words; and (iii) the reference library. Id. ¶10. Moussa's searches, which totaled 35 minutes, did not yield more records. Id. The fact that PRD did not find more records about Community Mapping was not surprising, given that the program had only been an idea and would not have generated policies or procedures. Id. ¶13.

When LAPD works with an outside institution, LAPD's Manual requires that a memorandum of agreement ("MOA") be issued and maintained by PRD. Charney Decl. Ex. FFF, p. 64. In its initial search, PRD did not search for any MOAs with the academic institution referenced in the Senate Statement during the original search. Moussa Depo, pp. 21-22. PRD

did perform that search was performed after litigation was initiated, resulting only in an inapplicable MOA with USC. Moussa Decl. ¶14; Moussa Depo, pp. 181-83.

PRD's electronic records may not contain or refer to all of the paper records in PRD's custody. Moussa Depo, pp. 79-83. PRD did not search its hard-copy library for 2007 to 2008 directives relating to CTSOB. Moussa Depo, pp. 90-94, 119. PRD did not search on the file server for drafts, emails, or correspondence. Moussa Depo, pp. 139-41, 159-66, 174-78. It did not do so because a search of its electronic directive database and project list did not return any results for Community Mapping. PRD also only searched the titles of the files, not the contents. Id., p. 84. PRD also did not consult the Senate Statement, or record the search terms used. Id., pp. 105-06.

e. PTE

Training Division forwarded the search to staff in its sister division, Police Training and Education ("PTE"), which oversees the development of and maintains records relating to training. Pannell Decl. ¶¶ 2, 4, 8. PTE's Director, Luann Pannell ("Pannell"), would have known about any information coming into PTE about Community Mapping before December 2013. Pannell Decl. ¶11. Because the program was terminated before it started, no training was ever developed for it. Pannell Decl. ¶11.

Nonetheless, Pannell directed staff to search the databases and files of the division's various units. Id. ¶¶ 4, 12-13. PTE's practice is also to search the Division's shared computer files on the P drive. Id. ¶13. PTE's initial search did not uncover records regarding "Community Mapping." Id. at ¶14. Following an inquiry from the Discovery Section, PTE also searched for the subject of Countering Violent Extremism. Id. ¶14; Toyama Decl. ¶21. This subject had nothing to do with Community Mapping, but four records were found and disclosed. Pannell Decl. ¶14; Toyama Decl. ¶21. Pannell was not surprised that PTE did not find records about Community Mapping, as she knew the idea died in 2007 and PTE had not worked on any training for Community Mapping. Id. ¶¶ 10-12, 17-18.

Pannell attended meetings to discuss how to respond to the public's concerns about Community Mapping. Pannell Depo, pp. 106-16. Pannell had no recollection if she took notes at those meeting, and did not search for her notes from those meetings. Pannell Depo, pp. 109, 121-22.

4. File Server Backups

a. Divisional Files

LAPD has tapes containing backup data for divisional file servers from 2004-2008. Charney Depo. Ex. GG ("Huynh Depo."), pp. 84. From 2001 to late 2008, LAPD backed up its email and divisional files on magnetic tapes on a daily, weekly, and monthly basis. McClain Decl. ¶¶ 5-7. The backup tapes were intended to help recreate a server made inoperable by a catastrophic event such as a major earthquake. Id. The tapes were not intended or designed for the retrieval of emails or documents. McClain Decl. ¶7. The files on the backup tapes contain older versions of files, and copies of files that have since been deleted from the servers. McClain Decl. ¶6; Huynh Decl. ¶3. In late 2008, LAPD began transitioning away from using tapes as a backup. McClain Decl. ¶7. Since then, the backup tapes have been either discarded or abandoned in LAPD storage containers. McClain Decl., ¶¶ 11-12.

At the time Plaintiff made its CPRA request, backup tapes from 2007-2008 were within

the LAPD's nine year retention period. Charney Decl. Ex. CC ("McClain Depo"), p. 422; Charney Decl. Ex. NNN. LAPD has the equipment and software it needs to access data on divisional file server backups from 2004-2008. *See* McClain Decl. ¶18. It also has a trained, skilled person who can access the backups. McClain Decl. ¶9; Huynh Depo., pp. 123-26, 178-79.

Accessing CTSOB divisional files from backup tapes requires the following three steps: (1) locating the tapes that backed up the CTSOB divisional files in 2007-2008; (2) restoring the desired divisional files into a readable format; and (3) searching the files and exporting any results. Huynh Decl. ¶6.

In response to this lawsuit, LAPD located 1,374 monthly backup tapes abandoned in storage containers in multiple locations. McClain Decl. ¶12. Because of insufficient labeling, LAPD can determine the contents of only 284 of those tapes; the other 1090 tapes cannot be catalogued. McClain Decl. ¶¶ 12-13. If LAPD is able to locate the tapes that backed up the CTSOB divisional files in 2007-2008, it must then restore the desired divisional files from those tapes. McClain Decl., ¶10. Only if LAPD successfully restores the desired files can it search their contents. Hyunh Decl. ¶6.

As a test, LAPD located an October 2007 backup tape with CTSOB divisional files and conducted a time study on how long it would take to restore and search divisional files from the tape. McClain Decl. ¶¶ 12, 16, 18, 20; Hyunh Decl. ¶8. Based on that study, it would take an LAPD employee approximately one hour to determine if there are any other CTSOB tapes among the 284 tapes with identifying information,[6] one day per tape to restore the divisional files, and one day per tape to search for a search term and export the results. McClain Decl. ¶¶ 16, 20-21; Hyunh Decl. ¶9; Hyunh Depo., pp. 150-53. The time to access the backup tapes includes at least four hours of machine time, during which the IT personnel can do other things. Hyunh Depo, pp. 145, 150.

b. <u>Backup Email Files</u>

Downing may have sent emails about Community Mapping in 2007 and 2008. Downing Depo, pp. 195-209. Because the current LAPD email system is different from the one that existed in 2007-2008, the recovery of these emails is difficult. LAPD must recreate the 2007-2008 email environment in order to read email files from the backup tapes for that era. McClain Decl. ¶25. LAPD has the equipment, software, and knowledge to access the backup tapes for Downing's email from 2007 and 2008. McClain Depo, pp. 370-80. However, this task has never been done before. McClain Decl. ¶26. It would require up to 15 days just to recreate the email environment. McClain Decl. ¶¶ 31-32. LAPD would then need to create two to four electronic post offices for the pertinent period and it would take three days for each post office. McClain Decl. ¶31-32. It would take another eight hours to re-establish "target post offices", and build a Windows operating system compatible with the 2007-08 email software. McClain Decl. ¶¶34, 37. Thus, LAPD's best estimate is that it would take between 22 and 28 days and three weeks to identify and access data on a backup tape containing one user's email.[7] LAPD

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[6] LAPD cannot catalog the 1090 backup tapes that are not already cataloged. McClain Decl. ¶¶ 12-13.

[7] In her deposition, McClain stated that it would take three days to access email files. McClain Depo., pp. 288-90, 592, 595-96. But this estimate assumed the correct email

also does not have and does not know if it can procure all the equipment and materials necessary to complete these tasks. McClain Decl. ¶¶22-24, 27-29, 35-36, 38.

Technical roadblocks may prevent access to the backups. McClain Depo, pp. 286-90, 398-99, 588, 605-17. The only way LAPD can identify the roadblocks is to attempt to access the backups. McClain Depo, p. 588. Once the tapes are accessed, email can be filtered by date and searched by sender, recipient, and subject line. McClain Depo, pp. 275-76, 284-85. It may also be possible to search the body of the email. McClain Depo, pp. 276-78, 280-81.

D. Analysis

Petitioner Muslim Advocates argues that LAPD violated the CPRA by refusing to conduct a search reasonably calculated to locate all records related to the Community Mapping Program, and by refusing to search backup tapes for responsive documents. LAPD responds that it performed a reasonable search for records under the circumstances, and that it would be unduly burdensome to search backup tapes intended only for disaster recovery. LAPD points out that Community Mapping was a short-lived idea that terminated two weeks after it was announced and, although Petitioner signed a 2007 letter expressing concern over Community Mapping, it failed to make a records request until December 2013, six years after the program was terminated. Opp. at 8.

1. Reasonable Search

a. Scope of the Request

Petitioner argues that LAPD inaccurately described the scope of the Community Mapping request to its record custodians, resulting in an unreasonably narrow search being performed by the divisional staff. Pet. Op. Br. at 13-14. The 15.2 form prepared by Monk described the request as "asking for records pertaining to the policies or practices based upon individuals or communities that are Muslim, or of Arab, South Asian, or Middle Eastern descent." Charney Decl. Ex. AAAA. Petitioner argues that this description is vague, and does not alert divisional staff to search for records reflecting or relating to Community Mapping. Pet. Op. Br. at 14.

As LAPD points out (Opp. at 10), the agency is not required to use the same language as the request when conveying it to record custodians. CYAC, *supra*, 220 Cal.App.4th at 1429-30. More importantly, the language challenged by Petitioner appeared in an introductory paragraph summarizing the CPRA request and did not purport to supplant it. *See* Charney Decl. Ex. AAAA. The 15.2 attached a copy of the request and explicitly instructed the divisions to review it. Id.

The language used in Monk's 15.2 to summarize the request for division staff was adequate to alert division staff as to the records Petitioner sought.[8]

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environment and only included the time for one post office. McClain Decl. ¶33.

In 2011, McClain accessed four backups, and each took only between 15 minutes and an hour and a half of human time to retrieve. McClain Depo., pp. 537-38, 541-43, 565-70, 617; Charney Decl. Exs. OOO, PPP. However, she did not re-create the email environment necessary to read or search the restored email files. McClain Decl. ¶40. LAPD was therefore never able to read and search through the restored files. Id.

[8] Divisional staff then performed searches for the term "Community Mapping". *See, e.g.*

b. Logical Places for Responsive Records

Petitioner argues that LAPD failed to send the request to all of the bureaus, divisions, and sections reasonably likely to possess responsive records. Pet. Op. Br. at 14. Monk sent the 15.2 to only three divisions: CTSOB, PRD, and PTE. Charney Decl. Exs. AAA, BBB, CCC. Even though PRD informed Monk that responsive records were likely to be found in the Community Relations Section and the Office of the Chief of Police, no additional 15.2s were directed to those divisions. Toyama Depo, pp. 270-71. Petitioner also argues that, given the subject matter of the request, searches of the Legal Affairs Division, Risk Management Division, Fiscal Operations Division, and those patrol areas with significant Muslim populations would have been reasonable. Pet. Op. Br. at 15.

LAPD asserts that the three divisions actually searched, plus the IT Department, was sufficient to cover all of the divisions likely to have responsive records. CTSOB received a 15.2 because Downing created Community Mapping and he was the head of CTSOB. A 15.2 was sent to PRD because the request sought LAPD policies and procedures, and PRD maintains those policies and procedures. PTE received a 15.2 because it implements policy and procedure through training. Once Petitioner identified specific employees, a 15.2 also was sent to the IT Division, directing the search of the seven employee email accounts Petitioner selected. Toyama Decl. ¶¶ 17, 27. Opp. at 11. LAPD points out that the Community Relations Division was not established until 2015, and would not have documents from 2007 when Community Mapping was proposed. Toyama Decl. ¶29. LAPD further asserts that the Legal Affairs Division, Risk Management Division, and Fiscal Operations Division have functions unrelated to the Community Mapping program. Id.; Opp. at 11-12.

The court agrees that it is unlikely that Legal Affairs Division, Risk Management Division, the Fiscal Operations Division, and the Community Relations Division would have responsive documents. An agency is not required to search every file where a document could possibly exist, only to make a reasonable search under the circumstances. Rein v. USPTO, (4th Cir. 2009) 553 F.3d 353, 364. By all accounts the Community Mapping program never advanced past a preliminary planning stage, and was publicly disavowed by LAPD after two weeks. Downing Decl. ¶¶ 11-14. No constitutional issues were ever actually implicated because no aspect of the program was ever officially placed into action. Nor were there any fiscal concerns, as the program was halted before it was ever officially commenced.

However, LAPD admits that it later searched Media Relations and discovered responsive documents, indicating that the initial distribution of the request was insufficient. Nguyen Decl. ¶6, Exs. E, F. Opp. at 12. As there was a public press conference at which the Community Mapping program was disavowed in response to public outcry, it is unclear why the request was not forwarded to Media Relations from the start. Certainly, the circumstances surrounding the Senate Statement and the subsequent fallout would make a search of Media Relations records reasonable.

Seguin Decl. ¶¶ 3-6; Moussa Decl. ¶¶ 7, 10, 13; Pannell Decl. ¶¶ 8-12, 17-18. Petitioner argues that staff should also have searched for records relating to Community Mapping (Pet. Op. Br. at 14), and that the actual staff searches that were too narrowly focused. Pet. Op. Br. at 14, n. 6. Petitioner does not explain what search term should have been used to uncover records that "relate to" Community Mapping without using those words.

LAPD further fails to address PRD's recommendation that the request be directed to the Office of Chief of Police. As Petitioner correctly points out, responsive documents uncovered during LAPD's search indicates that there are likely to be responsive documents in the Chief of Police's office. Reply at 8. Specifically, November 2007 correspondence from the Chief of Police's office was recently disclosed. Nguyen Decl. ¶7, Ex. F. This correspondence invited further dialogue between the Chief of Police and Muslim community leaders. Id. Downing also admits that he discussed the Community Mapping project with the Chief of Police. Downing Decl. ¶7.

LAPD did not timely search the Media Relations division, doing so only after litigation was commenced. While this task has now been performed, it does reflect on the care in responding to the initial request. LAPD has further failed to search the records of the Office of the Chief of Police, despite the fact that the Chief of Police was one of only three other LAPD employees with whom Downing discussed the Community Mapping project.

LAPD has therefore failed to make a reasonable search of the Office of the Chief of Police, where responsive documents were likely to be located.

c. Adequacy of Searches at CTSOB, PRE, and PTE

Petitioner challenges the adequacy of the searches performed in each of the three divisions, in particular CTSOB. Pet. Op. Br. at 15-16. Petitioner alleges that Sergeant Seguin, who performed the search at CTSOB, failed to look in the division's hard copy files, electronic devices, or inventories, did not speak to any employees other than Downing, and did not search for any correspondence regarding Community Mapping. Seguin only spoke with Downing, and searched for the Senate Statement and Community Mapping in the file server. Seguin Depo, pp. 36-38, 45-47, 59, 64-69. Seguin did not know if his search was capable of searching the contents of the documents in the server, or only the titles. Id., pp. 72-73.

LAPD asserts that Seguin's search was reasonable in light of Downing's representation that no responsive documents existed. Opp. at 12. Downing was the person most knowledgeable regarding Community Mapping, and he explained that he had only spoken with a few LAPD employees, and did not create any documents. Downing Decl. ¶¶ 7-9, 15-16. When Seguin's search did not turn up any responsive documents, he reasonably assumed based on Downing's representations that none existed. Opp. at 12.

As Petitioner points out, LAPD's is essentially arguing that LAPD is excused from conducting a more thorough search because Seguin did not have all of the correct information at the beginning of his search. Reply at 10. This is not the law. Courts "evaluate the reasonableness of an agency's search based on what the agency knew at the conclusion rather than what the agency speculated at its inception." Campbell v. U.S. Dep't of Justice, (D.C. Cir. 1998) 164 F.3d 20, 28.

An abbreviated initial search by Seguin would have been reasonable given his conversation with Downing, but the extent of the search he actually performed was inadequate. Seguin did not review the pertinent subject matter folders within the file server to ensure that his search captured all possible relevant documents. Seguin Depo, pp. 70-72. He should have looked at other subject matters on CTSOB's server such as "outreach" and "countering violent terrorism". He also only searched on two phrases -- "Senate Statement" and "Community Mapping" -- which would not necessarily reveal all documents relating to the Community Mapping program, only those which used that exact term. Seguin Depo, pp. 60-61. Finally,

Seguin admitted that he did not know whether his search of the file server included the contents of the documents. Seguin Depo, pp. 72-73. His search was inadequate to capture all relevant documents.

LAPD's position also is not reasonable given the records that subsequently were produced. Downing's represented that he (1) created no documents relating to the Community Mapping program, (2) spoke only with the Chief of Police and two other persons about the program, and (3) wrote no emails regarding the program have all been undermined by documents produced. Yet, LAPD has disclosed a CTSOB staff meeting agenda dated two weeks before the Senate Statement that mentions the Community Mapping program. Nguyen Decl. Ex. G. This agenda suggests that more employees besides Downing, the Chief of Police, and one or two others were aware of the Community Mapping program. An email from Downing dated March 2015 (long after the program's termination) regarding the Community Mapping program also has been disclosed which somewhat contradicts his assertion that he made no written communications. Charney Decl. Ex. KKK. LAPD has also disclosed a white paper dated November 2007 that references community mapping (Charney Decl. Ex. LLL) and a draft discussion paper also referring to community mapping. Charney Decl. Ex. XX.

Thus, although Seguin may have been reasonable in performing a limited initial search, the limited search has proved to be inadequate. LAPD's subsequent insistence that no additional searches need to be performed at CTSOB is unreasonable. Given that it has now become clear that further responsive documents may exist, LAPD has violated the CPRA by refusing to conduct a further reasonable search for documents within CTSOB's files.

Petitioner additionally challenges the searches performed by PRD and PTE. Pet. Op. Br. at 17-18. Petitioner argues that PRD should have a memorandum of agreement ("MOA") with any academic institution mentioned in the Senate Statement. Yet, PRD failed to look for one until recently. PRD failed to search the hard-copy library, working documents, drafts, or emails. Pet. Op. Br. at 17. PRD searched only the titles, not the contents, of the files in its database. Pet. Op. Br. at 17, n. 8. Petitioner also points out that PTE failed to search for meeting notes, despite Pannell's testimony that she attended at least one meeting where Community Mapping was discussed. Pet. Op. Br. at 17.[9]

The Community Mapping program had only been an idea and would not have generated any policies or procedures for PRD to handle. Moussa Decl. ¶13. PRD searched its hard-copy library, and a responsive record was located by this search. Id. ¶¶ 5, 8. PRD spent approximately 20 minutes searching the library. Id. ¶10. PRD searched in its MOA database as part of its initial search and found no responsive documents. Moussa Decl. ¶10. In a supplemental search, PRD found only a non-responsive MOA. Id. ¶14. Given the two week life of the Community Mapping program, no further PRD effort was required.

Similarly, the short-lived nature of the Community Mapping program meant that PTE would not have been directed to develop training. Pannell Decl. ¶11. PTE's staff searched the databases and files of the division's various units, including the P drive, and recovered no records on Community Mapping. Id. ¶¶ 4, 12-13. Pannell never testified that she took notes during any meetings relating to Community Mapping. Rather, she stated that she attended a

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[9] Petitioner faults LAPD personnel for not filling out a hard-copy "chrono" of their search activity. Pet. Op. Br. at 17, n. 9. There is no requirement in the CPRA that an agency must document the nature and extent of the search.

meeting where it was announced that Community Mapping would not go forward. Pannell Depo., p. 106-16. Pannell had no recollection whether she took notes, and testified that she did not keep any notes she may have taken. Pannell Depo, pp. 108, 121-22. There is no evidence that any additional search would yield further responsive documents.

Petitioner has demonstrated that the search at CTSOB was inadequate. The searches performed by PRD and PTE were reasonable under the circumstances.

2. Electronic Records

Petitioner argues that LAPD violated the CPRA by refusing to search its backup tapes for emails dating from 2007. Pet. Op. Br. at 18. LAPD asserts that searching those backup tapes would impose an undue burden on its staff. Opp. at 14.

CPRA requests "inevitably impose some burden on government agencies." CFAC, *supra*, 67 Cal.App.4th at 166. To justify its refusal to comply with a CPRA request on grounds of "undue burden," an agency must demonstrate that "on the facts of the particular case the public interest served by not making the record public clearly outweighs the public interest served by disclosure of the record." §6255. The agency bears the burden of demonstrating a "clear overbalance" on the side of non-disclosure. Fredericks v. Superior Court, (2015) 233 Cal.App.4th 209, 228. An agency cannot meet this heavy burden with mere speculation. Connell v. Superior Court, (1997) 56 Cal.App.4th 601, 612.

In assigning weight to the public interest in disclosure, courts must look not only at the nature of the records requested, but also how directly the disclosure of such records contribute to the public's understanding of government. Humane Society of U.S. v. Superior Court, (2013) 214 Cal.App.4th 1233, 1268; Connell v. Superior Court, (1997) 56 Cal.App.4th 601, 616. The public interest in disclosure must be more than "hypothetical" or "minimal." County of Santa Clara v. Superior Court, (2009) 170 Cal.App.4th 1301, 1323-24. Also relevant is the likelihood of finding responsive records. Reyes v. EPA, (D.D.C. 2014) 991 F.Supp.2d 20, 27.

a. CTSOB Documents

Petitioner requests that LAPD access CTSOB's divisional files contained on backup tapes necessary to search CTSOB's shared P drives and individual G drives from 2007 and 2008. Pet. Op. Br. at 19. Petitioner argues that there is reason to believe that responsive documents exist on these backups because CTSOB staff continued to create records referring to Community Mapping after the program was shelved in 2007. *See* Charney Decl. Ex. XX. Other evidence indicates that drafts of the Senate Statement might be present on the backup tapes. Downing Depo, pp. 187-89 (reference to "track changes"); Charney Decl. Ex. ZZ. Pet. Op. Br. at 19.

LAPD argues that accessing these backup tapes would be unduly burdensome. The backup tapes were prepared for the purposes of disaster recovery, and were not designed or intended for the retrieval of individual documents or emails. McClain Decl. ¶¶ 5-7. The tapes were intended to help recreate a server rendered inoperable by a catastrophic event; they were not designed for retrieval of emails and records. Id. The tapes are obsolete, and have been abandoned and unused in a storage container for many years. McClain Decl. ¶¶ 11-12. LAPD argues that FOIA cases have held that information stored on backup tapes is not reasonably accessible, relying principally on Stewart v. U.S. Dept. of Interior, ("Stewart") (10th Cir. 2009) 554 F.3d 1236, 1243-44 (searching backup tapes would be "impossible, impractical, or futile" where files were "not organized for retrieval of individual documents or files, but rather for

purposes of disaster recovery). Opp. at 15-16.

In Stewart, the court ruled on the question of whether a group of counties would receive a fee waiver for document production in a FOIA case. Id. at 1241-42. The court determined that a fee waiver was not warranted because there was no evidence that searching the backups would lead to the disclosure of new records, as the agency was already required to print and store hard copies of the records. Id. at 1243. The court did not address the issue of whether backup disaster recovery files were subject to disclosure.

Stewart does not, therefore, support LAPD's argument that it should be excused from searching the backup tapes because they were intended for disaster recovery, not retrieval of files. Even within the narrow bounds of its holding, the Stewart court did not create any categorical rule about whether accessing disaster recovery backups was "unduly burdensome"; instead its ruling was based on the particular facts of that case. Id. at 1243.

The mere fact that the LAPD's backup tapes were created for disaster recovery does not categorically insulate them from disclosure under the CPRA.

LAPD next argues that the time necessary to access and search the backup tapes for CTSOB's divisional files is unduly burdensome. Opp. at 16. Accessing CTSOB divisional files takes three steps: (1) locating the backup tapes containing CTSOB divisional files; (2) restoring the CTSOB divisional files into a readable format; (3) and searching the files and exporting the results. LAPD has identified 284 cataloged backup tapes, and estimates that it will take one hour to determine how many of the tapes contain 2007-08 CTSOB divisional files, and one business day to restore the CTSOB divisional files on each of the identified backup tapes. McClain Decl. ¶¶ 12, 16, 21. It would then take another day per tape to search using a single search term. Hyunh Decl. ¶9. Thus, it would take two days to search for one search term on one pertinent tape. Opp. at 17. This does not include the week and four days LAPD already has spent searching the tapes and conducting a single tape test. Opp. at 17.

LAPD asserts that this burden far outweighs the public interest in Community Mapping, as the program was never fully developed. LAPD contends that a search for responsive documents will not "cast a light" on government discrimination against Muslims, or aid in "understanding the genesis" of an aborted idea. Instead, LAPD argues that the discovery of 10-year old records of a short-lived, undeveloped idea will not advance the public interest. Opp. at 18. LAPD further contends that there is a minimal likelihood of finding any responsive documents among the CTSOB tapes. A test tape yielded only one responsive record, which was an innocuous meeting agenda that only confirmed LAPD's timeline. The draft white paper which Petitioner relies upon only mentions "community mapping" in an inconsequential reference and does not support an inference that more documents must exist. Opp. at 17.

Petitioner replies that the purpose of its request is to understand how and to what extent LAPD developed the Community Mapping program. Reply at 12. According to Petitioner, the public interest in looking at the LAPD's records to scrutinize LAPD's controversial practices towards the Muslim community -- particularly the Community Mapping program -- is "formidable". Pet. Op. Br. at 20-21.

Petitioner has somewhat overstated the public interest in records from a 10-year old aborted program. The public does have an interest in obtaining records enabling it to hold LAPD accountable to its duty to enforce the law in a fair and even-handed manner. *See* CBS, Inc. v. Block, (1986) 42 Cal.3d 646, 656 (CPRA's goal is, among other things, to permit citizens to hold the government to account by "ascertain[ing] whether the law is being... carried out in an

evenhanded manner."). That interest is furthered by disclosure of relevant Community Mapping program records, regardless of whether or how long the program was implemented. However, that public interest is lessened by the brevity of the program and the passage of time. Information that is of critical public interest one day may be of mere historical importance the next. In this case, the public interest in records of the short-lived Community Mapping program is no longer "formidable". There remains, however, a substantial public interest in learning about the process by which the Community Mapping program was proposed and developed, and how far LAPD went in implementing the program before it was shut down.

Also relevant is Petitioner's six-year delay in seeking these records. Petitioner argues that "LAPD may not engraft a statute of limitations onto the CPRA." Reply at 6. This is true, but the delay remains relevant to the extent that it increases LAPD's burden by forcing it to recover records from backup files instead of from a simple search of an existing computer system. Had Petitioner sought Community Mapping program records within a year of 2007-08, LAPD would have been able to retrieve them from its existing system. *See* McClain Decl. ¶3. The delay forces LAPD to look at backup files at a greatly increased effort. Petitioner has the right to seek such records, but the burden would not have been so great had Petitioner acted swiftly.

The question then becomes whether LAPD's burden in searching the backup tapes for 2007 to 2008 CTSOB divisional files outweighs this substantial public interest. Although LAPD asserts that the single document found during the test study weighs against finding responsive documents on the backup tapes (Opp. at 17), this evidence actually shows the opposite. LAPD selected a tape at random from the appropriate time period and discovered a previously undisclosed responsive document. This suggests that other undisclosed documents may be present on the backup tapes.

The burden to LAPD in searching the backup tapes is significant, but not necessarily undue. By performing the test study on a single tape, LAPD already has determined that it is capable of accessing those documents. McClain Decl. ¶20. Petitioner also implicitly concedes that the 1090 uncatalogued tapes need not be reviewed (Pet. Op. Br. at 20), leaving 284 catalogued tapes. For a full accounting of all files created and deleted in 2007-08, LAPD would have to locate about 24 backup tapes that capture CTSOOB's divisional files. McClain Decl. ¶17.[10] LAPD admits that it will take only about one hour to search the 284 catalogued tapes to determine if they contain CTSOB divisional files. McClain Decl. ¶16. A search of the identified tapes with CTSOB files on it for the term "Community Mapping" then will take approximately two business days per tape. McClain Decl. ¶21. According to Hyunh's deposition testimony, this time will include a significant amount of "machine time" during which employees can perform other tasks. Hyunh Depo., pp. 140-41, 145. The search for Community Mapping document in CTSOB divisional files, therefore, could take up to 28 days (24 backup tapes x 2 business days).

Depending on the amount of effort that will actually prove necessary, LAPD's burden in accessing the CTSOB backup tapes does not necessarily outweigh the public interest in disclosure; it depends on how many catalogued tapes contain CTSOB files. Therefore, LAPD will be directed to perform the initial one hour evaluation of the 284 catalogued tapes to search

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[10] LAPD suggests that Petitioner might want only tapes for specified months, but Petitioner has not accepted that limitation. Opp. at 16.

for CTSOB files and determine the precise number of backup tapes containing CTSOB divisional files, which may or may not be the estimated 24 tapes. Once the number of tapes is known, LAPD can provide a better assessment of the time necessary to complete the search. The hearing will be continued for this purpose.

Once LAPD determines how many tapes must be searched, and if the court determines that a search of that number of tapes is reasonable, there remains the issue of cost. Generally, the agency may charge only the direct costs of copying records. §6253(b). Ancillary costs of retrieving, inspecting, and handling those records may not be charged to the requestor. Fredericks v. Superior Court, (2015) 233 Cal.App.4th 209, 236. A statutory exception exists when the agency (1) must produce a copy of an electronic record between "regularly scheduled intervals" of production, and (2) when compliance with the request for an electronic record "would require data compilation, extraction, or programming to produce the record. §6253.9(b). The parties did not address section 6253.9(b) in their briefs, but the effort to restore CTSOB divisional files on the backup tapes and search for Community Mapping program documents is just the type of extraction and/or programming effort that is within the statute's scope and for which the cost should be shifted. The pertinent cost issues are the amount claimed by LAPD for the ancillary costs and how they were calculated. *See* County of Santa Clara, (2009) 170 Cal.App.4th 1301, 1337. At the continued hearing, the parties will address the reasonableness of any charges LAPD wishes to impose for ancillary electronic record retrieval costs. *See* Fredericks, *supra,* 233 Cal.App.4th at 238.

b. Downing's Emails

Petitioner also seeks to compel LAPD to search the backup tapes for Downing's 2007-2008 emails. Petitioner argues that LAPD has previously accessed pre-2010 email from backup tapes on four occasions. McClain Depo., pp. 537-38, 541-43, 565-70. McClain testified that accessing the backups took between 15 minutes and an hour and a half of human time. Id. Petitioner argues that any LAPD's concern about technical roadblocks is based on speculation. LAPD must attempt to access the emails, filtering them by date and searching title and content based on sender, recipient, and subject line, before this concern can be evaluated. Pet. Op. Br. at 21.

LAPD asserts that searching for emails is considerably more burdensome than restoring CTSOB's document files. To recover these emails. LAPD must (1) locate backup tapes with the desired emails files, (2) restore the desired email files, (3) re-establish the target email post office, (4) create a work station, and (5) gain entry to Downing's email account. McClain Decl. ¶8. LAPD has discovered one tape that contains Downing's emails. McClain Decl. ¶14. LAPD can determine in three hours if Downing's emails from the pertinent period are among the remaining catalogued tapes. McClain Decl. ¶15. Each email account is assigned to an electronic post office. McClain Decl. ¶22. Because the current LAPD email system is different, LAPD first must re-create the 2007-08 email environment in order to read email files from backup tapes. Id. at ¶25. No one at LAPD has ever done this. McClain Decl. ¶26. It would require up to 15 days just to recreate the email environment. McClain Decl. ¶¶ 31-32. LAPD would then need to create two to four electronic post offices for the pertinent period and it would take three days for each post office. McClain Decl. ¶31-32. It would take another eight hours to re-establish "target post offices", and build a Windows operating system compatible with the 2007-08 email software. McClain Decl. ¶¶34, 37. LAPD would need Downing's passwords and then

could search at least the titles of emails and possibly the contents. McClain Decl. ¶¶38-39. LAPD does not have and does not know if it can procure all the equipment and materials necessary to complete these tasks. McClain Decl. ¶¶22-24, 27-29, 35-36, 38. Opp. at 19.

As discussed *ante*, there is a significant public interest in disclosure of the documents surrounding the Community Mapping program. The public interest in the disclosure of Downing's emails concerning the program is greater because he was its architect. If they exist, Downing's emails would reflect on the purpose and intent of the Community Mapping program. It is possible that such emails exist. Downing conceded during his deposition that he was not thinking about emails when he told Sergeant Seguin that there were no records regarding Community Mapping. Downing Depo, pp. 194-95. He testified that he did not know if there were any emails. Id. While LAPD characterizes such hypothetical emails as merely "FYI" emails (Opp. at 20), Petitioner asserts that information about who Downing informed of the Community Mapping program would be valuable information in its own right. Reply at 14.

Despite the significant interest, the burden of searching and recreating Downing's emails from the backup tapes outweighs the public interest in disclosure of those documents. LAPD would have to purchase equipment and software, or otherwise recreate it, to perform the task. LAPD would have to spend 15 days just to recreate the email environment. Downing's emails could be located on as many as four post offices, and each post office would take approximately three days to recreate. Thus, it would take approximately one month to even complete the preliminary steps to make the emails accessible. At that point, it is uncertain whether LAPD could even successfully access the documents; the backup tapes were not designed for this type of access, and no employee currently at LAPD has undertaken a task of this magnitude. The undue burden to LAPD in accessing Downing's emails from 2007-08 clearly overbalances the public interest in the disclosure of emails which may not exist.

Perhaps aware of this reality, Petitioner argues that "LAPD should, at a minimum, be ordered to perform a 'time study' to confirm the reality of the time the process will take." Reply at 14. Petitioner is referring to the test on a single backup tape in which LAPD searched for CTSOB divisional files. Unlike the divisional files, a test of a single backup tape is not possible because the requirements preliminary to that task -- equipment purchase, environment recreation, post office creation – are a major burden.

F. Conclusion

The petition for writ of mandate is granted in part. Petitioner has demonstrated that LAPD failed to search the Office of the Chief of Police for responsive documents. The search at CTSOB also was inadequate. LAPD will be directed to search at the Office of the Chief of Police and conduct a further CTSOB search consistent with this decision.

As for the backup tapes, the hearing will be continued for LAPD to perform an initial one hour evaluation of the 284 catalogued tapes and determine the precise number of backup tapes containing CTSOB divisional files. LAPD will then provide a better assessment of the time necessary to complete the search of those tapes for divisional documents. At the continued hearing, the parties will address the reasonableness of any charges LAPD wishes to impose for the ancillary electronic record costs. No further effort to recover Downing's emails is required because the undue burden clearly overbalances the public interest in their disclosure. In all other respects, the petition is denied.

The court will discuss with counsel a convenient date for the continued hearing.